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Jerome Peyrelevalde

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EXAMINER

ZURITA, JAMES II

ART UNIT

PAPER NUMBER

3625

MAIL DATE

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01/22/2010

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/024,355

**Applicant(s)**

PEYRELEVADE ET AL.

**Examiner**

JAMES ZURITA

**Art Unit**

3625

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 05 October 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-72 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-72 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/CD)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

In view of the Appeal Brief filed on 10/05/2009, PROSECUTION IS HEREBY REOPENED. New grounds of rejection are set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing below:

/Jeffrey A. Smith/

Supervisory Patent Examiner, Art Unit 3625.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-22, 25-55 and 58-72 are rejected under 35 U.S.C. 103(a) as being unpatentable over Voticky (US 6,801,216) in view of Orpaz et al. (US 6937755).

**As per claim 1**, Voticky discloses selecting beauty products, including:  
accessing a facial image. See, for example, references to various picture images, as in Fig. 9 and related text.

receiving from the user a selection of at least one beauty product for simulated application to the facial image. See, for example, at least Fig. 10 and related text, concerning selection references 222 and 224.

simulating the at least one selected beauty product on the facial image. See, for example, at least Fig. 9 and references to overlays, as in an "After picture."

determining a recommended beauty product based at least in part on the at least one selected product. See, for example, at least Col. 11, lines 26-53, concerning product suggestions and recommendations.

Voticky does not specifically disclose simulating the at least one recommended beauty product on the facial image. This is disclosed by Orpaz, as in col. 10, line 62-col. 11, line 5.

It would have been obvious to one of ordinary skill in the art at the time of applicant's invention to combine Voticky and Orpaz to disclose simulating the at least one recommended beauty product on the facial image.

One of ordinary skill in the art at the time of applicant's invention would have been motivated to combine Voticky and Orpaz to disclose simulating the at least one recommended beauty product on the facial image because the incorporation of such features is no more than the predictable use of prior art elements according to their established function.

***As per claim 2***, Voticky discloses causing the facial image to be displayed to the user. See, for example, at least Fig. 9 and related text.

***As per claim 3***, Voticky discloses that the recommended beauty product is simulated on the facial image while the simulation of the at least one selected product appears on the facial image. See, for example, at least Col. 11, lines 26-37.

***As per claim 4***, Voticky discloses that causing the facial image to be displayed includes providing software that facilitates display of the facial image. See, for example, at least Col. 1, lines 18-42.

***As per claim 5***, Voticky discloses that the facial image is an image of the user's face. See, for example, references to picture of a person, as in Col. 1, lines 33-51.

***As per claim 6***, Voticky discloses processing an initial facial image in a manner to thereafter permit simulated application of a beauty product to a selected portion of the facial image. See, for example, at least Col. 11, lines 6-20, which allows for selective application to various portions of the image.

***As per claim 7***, Voticky discloses receiving from the user an affirmative request seeking a recommendation, and wherein the simulation of the recommended product appears on the facial image after the user affirmatively seeks a recommendation. See, for example, at least Col. 11, lines 26-37.

***As per claim 8***, Voticky discloses that the request identifies at least one of a brand, price, store, and product characteristic. See, for example, at least Col. 10, lines 8-16 and references to selection of product lines. See also references to manufacturer, as in Col. 11, lines 28-53.

***As per claim 9***, Voticky discloses displaying a button activatable to cause a recommendation to be displayed. See, for example, at least Col. 3, lines 32-40.

***As per claim 10***, Voticky discloses sequentially simulating alternative recommendations. See, for example, at least Col. 9, lines 16-29.

***As per claim 11***, Voticky discloses causing the facial image to be displayed to the user (See, for example, at least Fig. 12 and related text). Voticky does not specifically disclose that a first alternative simulated recommendation is displayed simultaneously on the facial image with a display of the at least one selected product and wherein thereafter a second alternative simulated recommendation is displayed simultaneously on the facial image with a display of the at least one selected product.

This feature is disclosed by Orpaz, Fig. 4 and related text, as in Col. 4, lines 37-50. It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine Voticky and Orpaz to disclose that a first alternative simulated recommendation is displayed simultaneously on the facial image with a display of the at least one selected product, and wherein thereafter a second alternative simulated recommendation is displayed simultaneously on the facial image with a display of the at least one selected product.

One of ordinary skill in the art at the time the invention was made would have been motivated to combine Voticky and Orpaz to disclose that a first alternative simulated recommendation is displayed simultaneously on the facial image with a display of the at least one selected product, and wherein thereafter a second alternative simulated recommendation is displayed simultaneously on the facial image with a

display of the at least one selected product for the obvious reason that a customer may wish to view various looks at the same time and because the incorporation of such features is no more than the predictable use of prior art elements according to their established function.

Claim 12 is rejected on the same grounds as claim 11.

***As per claim 13***, Voticky discloses that the recommended product is complementary to the selected product, and maintaining a data structure identifying products, and wherein determining a recommended beauty product is accomplished by accessing the data structure. See, for example, at least Col. 8, line 61-Col. 9, line 14.

***As per claim 14***, Voticky discloses that the data structure is populated with information derived from at least one of advice of beauty experts, user preference data, user purchase history, and survey data. See, for example, references to professional version, as in Fig. 4.

***As per claim 15***, Voticky discloses eliciting personal information from the user, wherein the recommendation is a function of both at least one selected product and the personal information. (see at least references to a user's face, as in Col. 7, lines 21-30).

***As per claim 16***, Voticky discloses that personal information includes at least one of age, skin type, skin texture, skin tone, wrinkles, hair color, hair style, hair condition, eye color~ allergies, facial features, demographics, user preferences, and purchase history. (See, for example, at least Col. 1, lines 33-51).

***As per claim 17***, Moticky discloses providing the user with an ability to select a basis for a recommendation, the basis being at least one of consumer survey data, consumer buying preferences, and expert advice (See, for example, Fig.4 and related text, concerning professional and customer versions).

Claim 18 is rejected on the same grounds as claim 11.

Claim 19 is rejected on the same grounds as claim 11.

***As per claim 20***, Voticky discloses that each facial image has a differing combination of beauty products simulated thereon. See, for example, at least Col. 8, line 61 -Col. 9, line 15).

***As per claim 21***, Voticky discloses a network environment, wherein accessing the facial image and receiving the user selection occur via a network and in at least one location remote from a location of the user. See, for example, at least Fig. 1 and related text concerning network.

Claim 22, an independent claim, is rejected on the same grounds as claim 1.

For Claims 23-24, see rejection under 103.

***As per claim 25***, Voticky discloses providing the user with an option to trigger a simulation includes providing the user with an option to trigger a simulation of both the selected beauty product and the complementary beauty product. See at least references to selecting pictures, as in Col. 2, lines 17-40.

Claim 26 is rejected on the same grounds as claim 11.

Claim 27 is rejected on the same grounds as claim 10.



**As per claim 28**, Voticky discloses providing the user with an option to change a color of the selected beauty product. See, for example, at least Col 10, lines 8-24.

**As per claim 29**, Voticky discloses providing users with options to change a color of complementary beauty product. See, for example, at least Col 10, lines 8-24.

**As per claim 30**, Voticky discloses that the option to change the color is based on at least one of a color bar, color palette, progressive color adjuster, and textual entry. See, for example, at least Col. 10, lines 8-24.

**As per claim 31**, Voticky discloses that the facial image includes at least one of a photograph, simulation, and graphical representation. See, for example, at least Fig. 10 and related text, and other references to graphic layers and picture.

Claim 32 is rejected on the same grounds as claim 21.

As per claim 33, Voticky discloses receiving a request from the user for an alternative complementary product recommendation. See at least Col. 8, lines 5-14.

Claim 34 is rejected on the same grounds as claim 22.

**As per claim 35**, Voticky discloses providing the user with an option to change a color of at least one of the selected beauty product, the recommended complementary beauty product, and the alternative complementary product. See, for example, at least Col 10, lines 8-24.

Claim 36, an Independent claim, is rejected on the same grounds as claim 1.

Claim 37 is rejected on the same grounds as claim 3.

Claim 38 is rejected on the same grounds as claim 4.

Claim 39 is rejected on the same grounds as claim 5.

Claim 40 is rejected on the same grounds as claim 6.

Claim 41 is rejected on the same grounds as claim 7.

Claim 42 is rejected on the same grounds as claim 8.

Claim 43 is rejected on the same grounds as claim 9.

Claim 44 is rejected on the same grounds as claim 10.

Claim 45 is rejected on the same grounds as claim 11.

Claim 46 is rejected on the same grounds as claim 12.

Claim 47 is rejected on the same grounds as claim 13.

Claim 48 is rejected on the same grounds as claim 14.

Claim 49 is rejected on the same grounds as claim 15.

Claim 50 is rejected on the same grounds as claim 16.

Claim 51 is rejected on the same grounds as claim 17.

As per claim 52, Voticky discloses that the display presents two facial images, and wherein differing recommended products are displayed on each image. See at least Col. 8, lines 4-23.

***As per claim 53***, Voticky discloses that multiple facial images are simultaneously displayed. For example, Col. 8, lines 4-23.

***As per claim 54***, Voticky discloses that the simulator visually simulates a differing combination of beauty products on each facial image. See, for example, at least Col. 8, line 61-Co1.9, line 28.

Claim 55, an independent claim, is rejected on the same grounds as claim 1.

For Claims 56-57, see 103 rejection, below.

Claim 58 is rejected on the same grounds as claims 22 and 25.

Claim 59 is rejected on the same grounds as claim 11.

Claim 60 is rejected on the same grounds as claim 27.

Claim 61 is rejected on the same grounds as claim 28.

Claim 62 is rejected on the same grounds as claim 29.

Claim 63 is rejected on the same grounds as claim 30.

Claim 64 is rejected on the same grounds as claim 31.

Claim 65 is rejected on the same grounds as claim 33.

Claim 66 is rejected on the same grounds as claim 35.

**As per claim 67**, Voticky discloses a storage location for storing the facial image. See, for example, at least Fig. 2 and related text.

Claim 68, an independent claim, is rejected on the same grounds as claim 1.

As per claim 69, Voticky discloses that the personal information includes an image of the user on which the simulating occurs. See, for example, at least Fig. 10 and related text, and other references to graphic layers and picture.

**As per claim 70**, Voticky discloses processing the image of the user to determine facial characteristics, and wherein determining takes into account the facial characteristics. See, for example, at last Col. 11, lines 21-25.

Claim 71 is rejected on the same grounds as claim 21.

Claim 72 is rejected on the same grounds as claim 1.

**Claims 23-24, 56-57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Voticky, Orpaz and admitted prior art.**

Wicky and Orpaz do not specifically disclose the use of Artificial Intelligence.

As admitted prior art., it was old and well know at the time the invention was made to analyze historical data to provide guidance concerning consumer preferences.

It would have been obvious to one of ordinary skill at the time the invention was made to combine Voticky, Orpaz and knowledge of one of ordinary skill to disclose identifying a complementary product is performed using an artificial intelligence engine (as in claims 23 and 56) and to disclose .that the artificial intelligence engine is based on at least one of a neural network, constraint program, fuzzy logic, classification, conventional artificial intelligence, symbolic manipulation, fuzzy set theory, evolutionary computation, cybernetics, data mining, approximate reasoning, derivative-free optimization, and soft computing (claims 24 and 57).

One of ordinary skill at the time the invention was made would have been motivated to combine Voticky, Orpaz and knowledge of one of ordinary skill to disclose identifying a complementary product is performed using an artificial intelligence engine (as in claims 23 and 56) and to disclose .that the artificial intelligence engine is based on at least one of a neural network, constraint program, fuzzy logic, classification, conventional artificial intelligence, symbolic manipulation, fuzzy set theory, evolutionary computation, cybernetics, data mining, approximate reasoning, derivative-free optimization, and soft computing (claims 24 and 57) for the obvious reason that by having information concerning consumer preferences, a company is better able to serve

the public, and be able to provide a powerful and persuasive marketing tool and because the incorporation of such features is no more than the predictable use of prior art elements according to their established function.

### ***Response to Arguments***

The Examiner notes

...Where an explicit definition is provided by the applicant for a term, that definition will control interpretation of the term as it is used in the claim. *Toro Co. v. White Consolidated Industries Inc.*, 199 F.3d 1295, 1301, 53 USPQ2d 1065, 1069 (Fed. Cir. 1999) (meaning of words used in a claim is not construed in a "lexicographic vacuum, but in the context of the specification and drawings."). Any special meaning assigned to a term "must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention." *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998). See also MPEP § 2111.01.

- During prosecution, claims are given their broadest reasonable interpretation:

USPTO personnel are to give claims their broadest reasonable interpretation in light of the supporting disclosure. In *re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997). Limitations appearing in the specification but not recited in the claim should not be read into the claim. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369, 67 USPQ2d 1947, 1950 (Fed. Cir. 2003) (claims must be interpreted "in view of the specification" without importing limitations from the specification into the claims unnecessarily). In *re Prater*, 415 F.2d 1393, 1404-05, 162 USPQ 541, 550- 551 (CCPA 1969). See also *In re Zletz*, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989) ("During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow.... The reason is simply that during patent prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.... An essential purpose of patent examination is to fashion claims that are precise, clear, correct, and unambiguous. MPEP 2106.

Although applicant's specifications contain several mentions of the various claimed terms, applicant provides no explicit definitions. Examples found "...throughout the specification..." are not definitions.

Further, it has been found "That a person skilled in the art might realize from reading the disclosure that such a particular definition (as now argued) is a possible

definition is not a sufficient indication to that person that that particular definition is part of Applicant's invention as originally filed. Claims yet unpatented are to be given the broadest reasonable interpretation consistent with the specification during the examination of a patent application. In re Prater, 415 F.2d 1393, 162 USPQ 541 (CCPA 1969). In the instant case, Applicant has not persuasively demonstrated that the Examiner has applied an unreasonable interpretation of the recited feature, that the interpretation is inconsistent with the specification, or that applied interpretation is repugnant to one of ordinary skill in the art.

An engine is the portion of a program that determines how the program manages and manipulates data. MICROSOFT PRESS Computer Dictionary. An "...artificial intelligence engine..." according to applicants, does not always encompass "artificial intelligence..." Thus, the label "... artificial intelligence..." that precedes the noun appears also to be non-functional descriptive material.

For purposes of Examination, the terms and their derivatives will be interpreted to include any type of computer instruction that includes artificial intelligence and that does not include artificial intelligence. The term artificial intelligence engine is interpreted to mean portion(s) of a program that determines how the program manages and manipulates data, where the portion of the program may include examples of what applicant calls artificial intelligence and where the portion of the program may exclude what applicant calls artificial intelligence.

### Official Notice and Traverse

A "traverse" is a denial of an opposing party's allegations of fact. (Black's Law Dictionary, "In common law pleading, a traverse signifies a denial.")

Applicant merely states:

The Examiner took Official Notice, asserting that "it was old and well know[n] at the time the invention was made to analyze historical data to provide guidance concerning consumer preferences."

Even if the Examiner's assertion were true, a notion which Applicants respectfully dispute..

Applicants' arguments do not traverse what Examiner regards as knowledge that would have been generally available to one of ordinary skill in the art at the time the invention was made.

Even if one were-to interpret applicants' statements as constituting a traverse, one would still be faced with the inquiry as to whether the traverse is adequate. An adequate traverse must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying Examiner's notice of what is well known to one of ordinary skill in the art. In re Boon, 439 F.2d 724, 728, 169 USPQ 231, 234 (CCPA1971). Applicant's traverse is not adequate.

If applicant does not seasonably traverse the well known statement during examination, then the object of the well known statement is taken to be admitted prior art. In re Chevenard, 139 F.2d 71,60 USPQ 239 (CCPA 1943). MPEP 2144.03 Reliance on Common Knowledge in the Art or "Well Known" Prior Art.

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In view of applicant's failure to adequately traverse official notice, the following are admitted prior art: it was old and well known at the time the invention was made to analyze historical data to provide guidance concerning consumer preferences.





***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES ZURITA whose telephone number is (571)272-6766. The examiner can normally be reached on 8am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jeffrey A. Smith can be reached on (571)272-6763. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/James Zurita/  
James Zurita  
Primary Examiner  
Art Unit 3625  
17 January 2009